Supreme Court, U.S.
FILED
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No. 91-767

In the Supreme Court of the United States

OCTOBER TERM, 1991

REPUBLIC NATIONAL BANK OF MIAMI

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX

STANLEY A. BEILEY*
ROBERT M. SONDAK
DAVID S. GARBETT
PAUL, LANDY, BEILEY
& HARPER, P.A.
Penthouse, Atico Financial Center
200 S.E. First Street
Miami, Florida 33131
(305) 358-9300
Counsel for Petitioner

KENNETH W. STARR
Solicitor General
ROBERT S. MUELLER, III
Assistant Attorney General
J. DOUGLAS WILSON
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217
Counsel for Respondent

*Counsel of Record

PETITION FOR CERTIORARI FILED OCTOBER 31, 1991
CERTIORARI GRANTED FEBRUARY 24, 1992

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RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA

Plaintiff.

v. CASE NO. 88-0349-CN-TES

ONE SINGLE FAMILY RESIDENCE LOCATED AT 6960 MIRAFLORES AVE., CORAL GABLES, FL., ALSO KNOWN AS LOT 10, IN BLOCK 14 OF COCOPLUM SEC., 2, PLAT "B" ACCORDING TO THE PLAT THEREOF, ETC.,

Date	Nr.	Proceeding
February 26	1	Complaint for forfeiture in rem.
March 8	8	Answer & Affirm. Defenses by Claimant Republic National Bank of Miami
March 9	9	Verified Claim by Republic
February 21	72	Memo Opinion(TES-2/21/90)1. The deft property is subject to forf. 2. DENYING Republic's claim. 3. THE U.S. is entitled to f/jmt. 4. The U.S. shall sub a f/judmt forthwith accord w/opinion. 5. The court retains juris to effectuate the terms of this order & to assess costs upon appropriate mot. (EOD-2/26/90-CCAP).

Date	Nr.	Proceeding
March 15	73	FINAL JUDGMENT OF FORF(TES-3/15/90) 1. THAT court finds the plft USA has probable cause to forf deft Real property. 2. DENYING Republic National Bank's claim w/prej. 3. The proceed's [sic] of the interlocutory sale of the deft real property is forf to the USA. 4. USA is hereby directed to dispose of the remaining proceed's [sic] of the interlocutory sale. (EOD-3/20//90-CCAP).
March 28	74	NOTICE OF APPEAL by Claimant Republic from F/J entered 3/15/90, & Memo Opinion entered 2/21/90. (Copies to USCA & Attys of record) (FEE PAID) #102495).

RELEVANT DOCKET ENTRIES

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

CASE NO. 90-5295

UNITED STATES OF AMERICA

Plaintiff-Appellee,

versus

ONE SINGLE FAMILY RESIDENCE
LOCATED AT 6960 MIRAFLORES
AVENUE, ETC.,

Defendant,

REPUBLIC NATIONAL BANK OF MIAMI,

Claimant-Appellant,

THULE HOLDING CORP.,

Claimant.

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1. RECORDS, EXHIBITS AND BRIEF INFORMATION

FILED

9/4/90	Brief for Appellant
9/4/90	Record Excerpts
11/6/90	Brief for Appellee
11/29/90	Reply Brief for Appellant

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7. REHEARING INFORMATION

7/1/91	Petition for Rehearing ☒ Appellant ☐ Appellee ☒ Reg. ☒ In Banc
8/7/91	Order Denying Rehearing

8. MOTIONS

Filing Motion to or for:		Response Filed by:	Date
6/4/90	Dismiss by Appellee	Appellant	6/27/90
		Carried with case	8/13/90

10. JUDGMENT OR MANDATE INFORMATION

6/10/91	Flg & entg. Judgment
8/26/91	Jdgt. as Mdt. Issd. to Clerk

11. SUPREME COURT INFORMATION NO. 91-767

11/19/91	Notice of Flg. of Cert. Pet. on 10/31/91		
3/2/92	Order of S.Ct.	☐ Denied ☒ Granted	2/24/92

UNITED STATES of America, Plaintiff,

v.

ONE SINGLE FAMILY RESIDENCE LOCATED AT 6960 MIRAFLORES AVENUE, CORAL GABLES, FLORIDA. Also Known As Lot 10, in Block 14, of Cocoplum Section 2 Plat "B", According to the Plat Thereof, as Recorded in Plat Book 115, at Page 84 of the Public Records of Dade County, Florida, Together With All Buildings, Fixtures and Appurtenances Thereto and All Improvements Thereon, Defendant.

No. 88-0349-CIV.

United States District Court,
S.D. Florida.

Feb. 21, 1990.

Stanley Beiley, Miami, Fla., for defendant Republic Nat. Bank.

Alan Dagen, Asst. U.S. Atty., Miami, Fla., for U.S.

MEMORANDUM OPINION

SCOTT, District Judge.

This controversy presents serious issues involving the civil forfeiture law, 21 U.S. C. § 881, and its impact upon lending institutions. It brings into play the duties and obligations of a commercial lending institution when unmistakable "red flags" have been raised as to the involvement of drug-related proceeds in a financial transaction. Concomitantly, it presents to the Court the duty to define the standard of conduct for lending institutions in such cases. We venture forward fully cognizant of this opinion's precedent-setting nature.

I. HISTORY OF THE CASE

The United States brings this *in rem* action[1] for forfeiture of real property located at 6960 Miraflores Avenue, Coral Gables, Florida.[2] The Government alleges that Indalecio Iglesias was the true owner of the property and that he has engaged in a continuing series of narcotics-related transactions in violation of 21 U.S.C. §§ 841(a)(1) and 846, resulting in over 100 million dollars in illegal proceeds. The Government further alleges that Iglesias used these illegal proceeds to purchase the defendant real property.

Thule Holding Corporation ("Thule"), a Panamanian corporation, filed its claim and answer as the record owner of the property. Initially, Thule alleged that it had no knowledge of any illegal activities related to the real property. However, shortly before trial, Thule executed a stipulation of settlement and consent to forfeiture.

Republic National Bank of Miami ("Republic") filed its claim and answer asserting an $800,000.00 lien interest in the real property pursuant to a mortgage and security agreement recorded September 30, 1987. The issues between Republic and the Government were tried to the Court on June 27 and 28, 1988. The questions litigated included probably cause, relation back and innocent ownership.

Following submission of the case, the Government moved to reopen the evidence, claiming that a previously undisclosed witness had critical evidence. After initially opposing the motion, Republic withdrew its opposition, provided that it could offer appropriate rebuttal evidence. That request was honored.

In October 1988, the trial resumed with the Government's witness, Rene J. Leonard, followed by a number of Republic's

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[1] The Court has jurisdiction pursuant to 28 U.S.C. §§1355 and 2461.

[2] Pursuant to stipulation between the parties, with Court approval, the property was sold for $1,050,000 on June 1, 1988. The funds are being held by the United States Marshal pending disposition of this case.

witnesses attacking Leonard's credibility and, thereafter, the Government's efforts to bolster his credibility. In light of the issues involved, the parties were provided ample opportunities to brief the multiple issues and they responded accordingly. Those memoranda have been quite helpful and counsel are commended. Our findings of fact and conclusions of law follow.[3]

II. PROBABLE CAUSE

A. Factual Background

1. Iglesias' Drug-Trafficking Activities

The Government called Drug Enforcement Administration ("DEA") Special Agent Lee Truesdale to establish probable cause.[4] Truesdale testified about his investigation of Indalecio "Andy" Iglesias, based on intelligence gathered through conversations with the Federal Bureau of Investigation ("FBI"), Internal Revenue Service ("IRS") and Customs Service ("Customs").[5]

Special Agent Truesdale testified that, on December 10, 1980, Iglesias was arrested on board a vessel stopped by Customs in which 300 pounds of marijuana were found in a sealed compartment. In April 1981, Iglesias was arrested for possession of 3,000 pounds of marijuana and fined $10,000.00 by Bahamian officials.

Truesdale also offered evidence obtained through "reliable" confidential informants. These informants possessed first-hand

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[3] Fed.R.Civ.P. 52(a); *see Anderson v. City of Bessemer City*, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985).

[4] The government bears the initial burden of establishing probable cause to believe that the property is derived from illegal drug activities. Once the government has established probably cause, the burden shifts to the claimant, either to rebut the government's evidence or to prove innocent ownership. *United States v. A Single Family Residence*, 803 F.2d 625, (11th Cir.1986).

[5] In a forfeiture proceeding, the government may offer hearsay evidence to establish probable cause. *United States v. A Single Family Residence*, 803 F.2d 625, 629 n. 2 (11th Cir. 1986).

knowledge of Iglesias's drug importation activities. The informants were involved in smuggling both marijuana and cocaine with Iglesias.

Through an informant, Iglesias began to import cocaine from Colombia into the United States. The informant estimated that Iglesias transported approximately 30,000 kilograms of cocaine between 1980 and 1985. Based upon his knowledge, the informant estimated that Iglesias earned 180 million dollars in drug profits between 1980 and 1985. This estimate was based upon Iglesias' charge per kilo ($6,000 to $9,000) for transportation multiplied by the number of kilos (30,000) transported over the five-year period. Iglesias had no legitimate source of income for this time period.

2. Iglesias' Acquisition of Miraflores

During this period between 1980 and 1985, while Iglesias was importing narcotics from Colombia, he was also purchasing expensive property in South Florida. The defendant property located at 6960 Miraflores Avenue, Coral Gables, Florida, was one such property.

In 1983, acting through Thule, a shell corporation, Iglesias purchased the Miraflores lot and partially-constructed residence. Between 1983 and 1984, through a series of agents and contractors, Iglesias continued construction on the Miraflores property. Iglesias and his wife were present at the site and supervised construction of the residence. Iglesias paid one contract between $200,000 and $220,000 across this time period. This contractor was paid $7,000 to $9,000 every week or two weeks, in cash, carried in a briefcase. A second contractor was paid approximately $140,000. About 60% of these payments were in cash. After the house was constructed, Iglesias and his family were the only persons ever to reside at Miraflores.

3. Republic's Mortgage Interest

In August 1987, IRS agents contacted Inocente Hernandez concerning Iglesias. Shortly thereafter, Iglesias called Hernandez to find out whether the IRS had contacted him. Hernandez told Iglesias that the IRS had called to ask questions about Iglesias and the property at Miraflores. Alerted to the investigation, Iglesias immediately began his efforts to recoup his financial investment before possible Government action. Iglesias put the house up for sale and approached Miami lenders to secure a mortgage on the property.

Republic agreed to provide an $800,000 one-year balloon note on the property, which was appraised at $1.2 million. Once the loan was approved, Republic transferred the proceeds to the borrower's Swiss bank account. Iglesias had recently purchased an airplane ticket to Geneva. He has apparently fled the jurisdiction of the United States.

B. Legal Analysis

Republic contends that the Government has failed to show any nexus between the property seized and a particular drug deal. However, Republic "misunderstands the government's burden. The government need not trace the cash to specific transactions, or actually prove by a preponderance of evidence a substantial connection to drug dealing." *United States v. $41,305.00 in Currency and Traveler's Checks*, 802 F.2d 1339, 1343 (11th Cir. 1986). (citation omitted).

The Eleventh Circuit has recently stated the test as follows:

> In demonstrating a substantial connection between the property and illegal drug transactions, the government is not required to show a relationship between the property and a specific drug transaction. The government's burden of demonstrating probable cause is less than prima facie proof but more than mere suspicion.

United States v. Four Parcels of Real Property in Greene and Tuscaloosa Counties, 893 F.2d 1245 (11th Cir. 1990).[6] In addition, probable cause may be based "wholly on circumstantial evidence, and that evidence may include facts learned after the actual seizure of the money." *$41,305.00,* 802 F.2d at 1343. Applying these principles, the Court makes the following factual findings on the issue of probably cause:

1. The Miraflores lot, with the residence, was worth $1.2 million dollars.

2. Iglesias purchased the Miraflores property through Thule. Thule was a straw owner for Iglesias.

3. Iglesias paid a series of agents and contractors to build a luxury home on the Miraflores lot. The contractors were paid large sums of money, primarily in cash, in payments under $10,000, to avoid the currency reporting laws.

4. Iglesias and his wife were present at the site and supervised construction of the property. Iglesias and his family are the only persons who ever resided at the property.

5. Iglesias is a known drug-trafficker. He has previously been arrested and convicted on narcotics charges.

6. The Court accepts Special Agent Truesdale's testimony that Iglesias earned 180 million dollars from the illegal importation of narcotics during the relevant time-frame. Truesdale's testimony was based on his own investigation, statements of other investigating agents, and statements of a reliable confidential informant. The informant's statements were, in turn, corroborated by the statements of other informants with personal knowledge.

7. Iglesias had no legitimate source of income during this time.

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[6] The "substantial connection" requirement is not found in the statute, but rather in the legislative history. *Four Million, Two Hundred and Fifty-Five Thousand Dollars,* 762 F.2d at 902 n. 14.

8. Iglesias knew that he was under investigation by the IRS, and that the Miraflores property was part of this investigation.

9. As soon as Iglesias became aware of the investigation, he put the house up for sale, secured an $800,000 mortgage loan on the property, and sent the money to a Swiss bank account.

The Court finds that probable cause exists to believe that Iglesias bought the Miraflores property and constructed the residence with drug profits, and then laundered the money through the Republic mortgage into his Swiss bank account. We have judged the facts "not with a clinical detachment, but with a common sense view to the realities of normal life." *Wilson v. Attaway*, 757 F.2d 1227, 1235 (11th Cir. 1985). Under this standard, we have also taken "into account, as a 'common experience consideration,' the fact that Miami has become a known center for drug-smuggling and money-laundering." *Four Million, Two Hundred and Fifty-Five Thousand Dollars*, 762 F.2d at 904; *United States v. One 1980 Bertram 58' Motor Yacht*, 876 F.2d 884, 888 n. 4 (11th Cir. 1989). Considering the "totality of the circumstances," *Four Parcels of Real Property*, 893 F.2d 1245, we conclude that the Government has met its burden of showing probable cause to forfeit the property.

III. RELATION BACK

Having established the probable cause requirement, the Government contends that Republic's claim must fail as a matter of law under the relation back doctrine. Under this doctrine, the interest of the United States vests in the property upon commission of the offense giving rise to the forfeiture. 21 U.S.C. § 881(h) (1984 amendment codifying relation back doctrine). A final judgment of forfeiture merely confirms the government's interest and therefore relates back to the time of the offense. Thus, the Government argues that Republic, as a subsequent purchaser, could not have acquired any interest in the property.

The genesis of the Government's position is *United States v. Stowell*, 133 U.S. 1, 10 S.Ct. 244, 33 L.Ed. 555 (1889), decided

over one hundred years ago. In *Stowell,* 133 U.S. at 16-17, 10 S.Ct. at 247, the Supreme Court stated that forfeiture of property to the United States relates back to the time of the offense and "avoids all intermediate sales and alienations, even to purchasers in good faith." The forfeiture statute in *Stowell* applied to property owned by a person who "knowingly has suffered or permitted the business of a distiller to be there carried on, or has connived at the same." *Stowell,* 133 U.S. at 2 n. 1, 10 S.Ct. at 244 n. 1 Thus, the Supreme Court in *Stowell* merely held that "an exception for innocent holders did not prevent forfeiture from relating back in the case of holders who did not qualify for the exception." *Eggleston v. State of Colorado,* 873 F.2d 242, 247 (10th Cir. 1989).

Since *Stowell* was decided, Congress has provided an innocent owner exception to most forfeiture statutes, including the civil forfeiture statute, 21 U.S.C. § 881. The innocent owner exception protects "the interest of an owner" who proves that the offense was committed without its "knowledge or consent." 21 U.S.C. § 881(a)(7). The Government contends, however, that the innocent owner provision only applies to claimants who owned the property at the time of the offense, and not to those who acquired the property afterward. To test the validity of this contention, the Court must review the language and legislative history of the innocent owner provision, 21 U.S.C. § 881(a)(7).

A. Legislative History

Section 881(a)(7) provides that "no property shall be forfeited ... to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner." The issue is whether the tern "owner" includes a claimant who acquired an interest in the property subsequent to the offense leading to forfeiture. The plain meaning of the language employed by Congress is the "primary, and ordinarily the most reliable" source of legislative intent. *Public Citizen v. United States Department of Justice,* _____ U.S. _____, 109 S.Ct. 2558, 105

L.Ed.2d 377 (1989). In this case, however, the meaning of the statute is not clear. Moreover, because "statutes always have some purpose," *id.*, a review of the legislative history can only assist the Court in divining Congressional intent.

Congress enacted the innocent owner exception "in order to protect the individual who obtains ownership of proceeds with no knowledge of the illegal transaction." Congressional Record-Senate, July 27, 1978, p. S23056 (remarks of Senator Culver). Congress intended "to make it clear that a bona fide party who has no knowledge or consent to the property he owns having been derived from an illegal transaction, that party would be able to establish that fact under this amendment and forfeiture would not occur." *Id.* at S23057 (remarks of Senator Nunn).

Thus, Congress believed that the innocent owner exception would protect bona fide purchasers who acquired ownership of the property subsequent to the offense giving rise to the forfeiture. The Government's position to the contrary is simply not supported by the legislative history of the statute.

B. Case Law

The Eleventh Circuit has not had the opportunity to decide whether the relation back doctrine prevents a bona fide purchaser from acquiring an interest in the property subsequent to the offense. Because the Court of Appeals has never denied the claim of a subsequent bona fide purchaser, the applicability of the innocent owner provision remains an open question.

The Government relies on *United States v. $41,305.00 in Currency and Traveler's Checks*, 802 F.2d 1339, 1346 (11th Cir. 1986). However, the court in *$41,305.00* did not reach the issue. Instead, the court merely expressed its doubt that intervention in a forfeiture proceeding could be premised on an interest acquired after the offense. The court stated in dicta: "Illegal use immediately vests title to the property in the sovereign, and cuts off the rights of third parties to obtain legally protectable interests in the property." Because *$41,305.00* was decided on a motion to

intervene, the claimant apparently did not raise the innocent owner exception and the court had no reason to consider the legislative history of that provision. Therefore, in our view, *$41,305.00* is not dispositive of the issue. *See United States v. One Single Family Residence,* 683 F.Supp. 783, 786-87 n. 1 (S.D.Fla. 1988) (Aronovitz, J.) (finding that *$41,305.00* left the issue open for another day).[7]

The remaining cases relied upon by the Government are inapposite. The forfeiture statutes at issue in *Florida Dealers and Growers Bank v. United States,* 279 F.2d 673 (5th Cir. 1960), and *Wingo v. United States,* 266 F.2d 421 (5th Cir. 1959) did not provide an exception for innocent owners.[8] Similarly, in *United States v. Four Parcels of Real Property at Lake Forrest Circle,* 870 F.2d 586 (11th Cir. 1989), and *United States v. One 1967 ChrisCraft 27 Foot Fiber Glass Boat,* 423 F.2d 1293 (5th Cir. 1970), the claimants could not demonstrate innocent ownership and therefore the court did not consider the issue.

As to *United States v. One Piece of Real Estate,* 571 F.Supp. 723 (W.D.Tex. 1983), that court only held that lienholders were not entitled to interest or other charges accruing after the date of the seizure. The court did not hold that the lienholders' interests ended as of the date of the offense. *See also United States v. All That Tract and Parcel of Land,* 602 F.Supp. 307, 313 n. 11 (N.D.Ga. 1985) (rejecting *One Piece of Real Estate).*

At least two courts have held that the innocent owner exception applies to bona fide purchasers, notwithstanding the relation back doctrine. In *Eggleston v. State of Colorado,* 873 F.2d 242, 247 (10th Cir. 1989), the Tenth Circuit held: "Forfeiture therefore cuts off the rights of subsequent lienholders or purchasers, subject to the so-called innocent owners exception in

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[7] The Eleventh Circuit has ordinarily considered the issues together. *See, e.g., United States v. Four Parcels of Real Property on Lake Forest Circle,* 870 F.2d 586, 593-94 (11th Cir.1989) (denying claimant relief because the forfeiture related back *and* the claimant could not prove innocent ownership).

[8] Moreover, the court in *Florida Dealers* remanded for a determination of whether remission or mitigation should be allowed.

section 881(a)(6)." In *United States v. One Single Family Residence*, 683 F.Supp. 783 (S.D.Fla. 1988) (Aronovitz, J.), another court in this district reached the same result. In addition to the legislative history, that court relied on section 881(a)(6), which governs proceeds and therefore contemplates third party recipients. The court also relied in part on the criminal forfeiture statute, which expressly protects bona fide purchasers. *See also United States v. One Parcel of Real Estate*, 715 F.Supp. 360, 363 (S.D.Fla. 1989) (Gonzalez, J.) (Congress did not intend "to place all land titles in doubt because of the 'relation back'" doctrine).

Indeed, more recently, the Supreme Court has suggested that a contrary result would be unconstitutional. In *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689-90, 94 S.Ct. 2080, 2094-95, 40 L.Ed.2d 452 (1974), the Court stated:

> [I]t would be difficult to reject the constitutional claim of an owner whose property had been taken from him without his privity or consent.... Similarly, the same might be said of an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property; for in that circumstance, it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive.

It is therefore imperative that we give effect to the legislative history of the innocent owner provision, in keeping with our duty "to avoid deciding difficult constitutional questions where the text fairly admits of a less problematic construction." *Public Citizen v. United States Department of Justice*, _____ U.S. _____, 109 S.Ct. 2558, 105 L.Ed.2d 377 (1989). If the interest of an innocent owner is protected from forfeiture, *a fortiori*, the interest of a bona fide purchaser is also protected. For these reasons, the Court concludes that a bond fide purchaser is entitled to the

protection of the innocent owner exception to the civil forfeiture statute, 21 U.S.C. § 881(a)(7).[9]

IV. INNOCENT OWNERSHIP

Having determined that Republic may assert the innocent owner provision, the Court must now consider whether Republic has met the standard of innocent ownership. To meet the requirements of this provision, the claimant must establish that the offense was committed without its "knowledge or consent." 21 U.S.C. § 881(a)(7). Republic argues that this standard contemplates actual knowledge by the claimant. The Government argues, however, that the claimant must establish that it (1) lacked actual knowledge; (2) lacked constructive knowledge; and (3) did all that reasonably could be expected to prevent the offense. For this third element, the Government cites *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689, 94 S.Ct. 2080, 2094, 40 L.Ed.2d 452 (1974), in which the Supreme Court stated that it might be difficult to reject the due process claim of a person who "had done all that reasonably could be expected to prevent the proscribed use of his property." The forfeiture statute at issue in *Calero-Toledo* did not provide an exception for innocent owners.

The Court notes that the Eleventh Circuit has made conflicting statements about the standard to be applied under the innocent owner provision of the civil forfeiture statute. In *United States v. Four Million, Two Hundred and Fifty-Five Thousand Dollars*, 762 F.2d 895, 906 (11th Cir. 1985), the Eleventh Circuit agreed with the claimant "that the application of the statutory 'innocent owner' defense turns on the claimant's actual knowledge, not constructive knowledge." However, in a footnote, the

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[9] To the extent that *United States v. Walker*, 889 F.2d 1317 (4th Cir. 1989) is to the contrary, we decline to follow it. *Walker* did not concern the precise issue before us. Instead, the court in *Walker* held that the relation back doctrine prevented heirs from acquiring an interest [in] [sic] property subject to forfeiture. Moreover, the court did not even consider the legislative history of the innocent owner provision. For these reasons, we do not find *Walker* persuasive on the issue before us.

court left "for another day the question of the *Calero-Toledo* dicta to forfeiture actions under 21 U.S.C. § 881(a)(6)." *Id.* at 906 n. 24. More recently, the Eleventh Circuit has incorporated the *Calero-Toledo* language into the standard for innocent ownership: "To prevail on a defense of innocent ownership, a claimant must prove not only that it was uninvolved in and unaware of the activity upon which forfeiture is sought, but also that it did everything that reasonably could be expected of it to prevent the activity." *United States v. One 1980 Bertram 58' Motor Yacht,* 876 F.2d 884, 888-89 (11th Cir. 1989).

Republic contends that the record does not demonstrate actual knowledge or consent to the purchase and construction of Miraflores with drug proceeds, or the laundering of money through the Republic loan. This "argument ignores the statutory requirement that the claimant, and not the government, bears the burden of proof on the 'innocent owner' defense. Under 21 U.S.C. § 881(a)(6), the government need not prove, and the district court need not find, that the claimant *had* actual knowledge. Rather, it is the claimant's responsibility to prove the *absence* of actual knowledge." *United States v. Four Million, Two Hundred and Fifty-Five Thousand Dollars,* 762 F.2d 895, 906-07 (11th Cir. 1985).

The Court has found only one reported decision assessing the standard to be applied to a commercial lending institution under the innocent owner provision. In *United States v. A Fee Simple Parcel of Real Property,* 650 F.Supp. 1534 (E.D.La. 1987),[10] the court held that the bank had established innocent ownership on the facts presented because (1) the borrower had a long-standing relationship with the bank; (2) the bank was not aware of any legal problems of the borrower; (3) the bank conducted a title search on the defendant property to ensure that the borrower was the true owner; and (4) even though the bank failed to obtain a financial statement from the borrower, the property was fully secured by collateral.

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[10] The Court is surprised that neither party brought this case to our attention, even though it was decided before this action was filed.

The conduct of the lender in *A Fee Simple* provides a study in contrast with the Miraflores transaction. The Court has distilled the trial record and we make the following factual findings on the issue of Republic's state of knowledge:

1. Thule, the borrower, is a Panamanian shell corporation;
2. The borrower's primary asset is a residence;
3. The residence was vacant at the time;
4. The borrower was about to sell its primary asset;
5. The lender did not ask the purpose of the loan;
6. The lender failed to conduct a title search;
7. The corporate borrower and Antonio Munoz Caballero ("Munoz"), the sole stockholder and a guarantor on the mortgage, were unknown to the lender;
8. Ramon Puentes, the second guarantor, had no known connection with the borrower;
9. Puentes made inconsistent statements of ownership.
10. The lender offered an $800,000 one-year balloon note on property valued at $1.2 million;
11. The borrower had no known source of repayment;
12. Fred de la Mata, president of Republic, was intimately involved in the transaction;
13. The lender quickly approved the loan outside normal channels;
14. The lender cannot document board approval of the loan, although documents indicate the board endorsed the loan after the closing;
15. Puentes, the guarantor, used part of the loan proceeds to buy expensive gifts for the bank president's family, and to buy an airplane ticket to Geneva for Iglesias;

16. The lender transferred the proceeds of the loan to the borrower's Swiss bank account.

There can be no question that the circumstances surrounding approval of the loan were suspicious. Republic was approached by Ramon Puentes, who claimed that he and a "partner" owned the property. However, documents reviewed by the lender show that Thule was the sole owner of the property, and that Thule's stock was, in turn, wholly owned by Antonio Munoz Caballero ("Munoz"). Yet Republic never questioned Puentes about this discrepancy, and did not even conduct a title search of the property.

The borrower, Thule, was a Panamanian shell corporation whose principal asset was a vacant residence. On this point, we adopt the testimony of Special Agent Truesdale:

> Through my experience and training I have come to learn Panamanian corporations and other offshore corporations are preferred by drug smugglers to conceal their assets, and to also form a base of what appears to be legitimate income.
>
> They usually do this by setting up what I would refer to as shell corporations overseas. In turn, they would set up bank accounts in the United states.
>
> Oftentimes, the accounts in the United States are in the name of trustee or nominee individuals. Once the money is transferred from overseas back into the United States, it is basically clean money or what we refer to as laundered money at that time.
>
> They will oftentimes pay taxes and do all the legalities to make things look legitimate with this money.

Transcript of Trial Testimony, at pages 22-23.

Although Puentes, the guarantor, had an existing relationship with Republic, the borrower did not. Indeed, both Thule and Munoz, Thule's sole shareholder, who agreed to sign as guarantor,

were unknown to Republic. Republic did not assess Munoz' financial standing and did not even meet him until the closing. The loan was sizeable — $800,000 on a $1.2 million dollar residence, interest payments for the first year and a one-year balloon note. Yet the borrow could not demonstrate how the loan was to be repaid. The borrower was not doing business and had no source of income. Because the borrower's financial statements were not audited, a lender would ordinarily require further proof of financial standing. Republic failed to do so, and did not even establish a repayment schedule.

Although the collateral was sufficient to cover the loan, we do not believe that banks are in the business of lending money with the intent to force sale of the property. Moreover, even though the house was for sale, the lender did not secure an undertaking by the borrower to use the proceeds of the sale for repayment of the loan. Nor did the lender ask Thule why a loan was necessary if the property was about to be sold.

The record also establishes that the president of Republic, Fred de la Mata, had an unusually close involvement in this loan transaction. De la Mata and other bank officers personally inspected the property. De la Mata claims that he presented the loan to the board for approval during a break at a convention held at the Sofitel Hotel, but he cannot document this meeting. Moreover, the only documentary evidence shows that the board endorsed the loan subsequent to the closing on the property.

Perhaps the most revealing fact in the record is Puentes' sizeable gift to de la Mata's family. Once the loan was approved, Puentes gave de la Mata's son and his fiance a Caribbean honeymoon package consisting of hotel reservations and two first-class, round-trip tickets to St. Thomas and St. Maarten. The package cost approximately $3,000. The travel agent testified that Iglesias actually booked the trip. Iglesias ordinarily paid in cash. This time, the travel agent was paid by check. The check was signed by Munoz, drawn on the new Republic account.

Finally, we note that after the loan was approved, Republic transferred the loan proceeds to Thule's Swiss bank account, through two cashiers' checks for $350,000 each. This transaction was handled by de la Mata's personal assistant.

Republic claims that many elements of this loan transaction are not unusual for South Florida. We emphasize that it is the totality of the circumstances that underlies our finding of actual knowledge. Moreover, even if the loan was not unusual for South Florida, that does not end the Court's inquiry.[11] The question is not whether this was a commercially sound loan. Rather, the Court must consider whether the lender knew that the property had been acquired with drug proceeds. An unusual loan transaction is merely evidence of the lender's knowledge. In any event, we do not believe that Republic has established commercial reasonableness on this factual record.[12]

At trial, de la Mata conceded that he did not rely on Munoz as guarantor of the loan. Nor do we believe that de la Mata relied on Thule. De la Mata testified again and again that the reason he did not investigate either Thule or Munoz was because he relied on Puentes as a long-standing customer of the bank. De la Mata expected to be paid — not by Thule, or even Munoz, but by Puentes. Yet Puentes had no known connection with either Thule or Munoz. Puentes had no known reason to agree to pay the mortgage.

The only rational conclusion is that Republic knew that Thule, a mere shell corporation, was controlled by Puentes. De la

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[11] The Government's expert testified that the loan was "unusual and unsound." The Court agrees, and we adopt the testimony of the Government's expert. Moreover, even the bank's expert admitted that the loan transaction might be considered unusual outside South Florida.

[12] Miraflores argues that the loan must have been reasonable because another bank had offered Puentes a loan on Miraflores. That lender offered a $750,000 loan at sixteen per cent interest. Beyond those facts, the particular circumstances of that loan are not before the Court. Again, we emphasize that determining the lender's knowledge is a fact-sensitive inquiry. That loan offer may well have been improper. Even so, Republic cannot be absolved by another lender's wrongdoing.

Mata must have known that Thule was a vehicle for Puentes. De la Mata knew that Puentes was trying to unload Miraflores. He did not ask why. Instead, in the face of overwhelming evidence, he chose to look the other way. De la Mata deliberately closed his eyes to what he had every reason to believe was the truth. *See United States v. Alvarez*, 837 F.2d 1024, 1028 (11th Cir. 1988) ("deliberate ignorance"); *United States v. Restrepo-Granda*, 575 F.2d 524, 529 (5th Cir. 1978) ("willful blindness").

Republic argues that to deny its claim would mean that banks must become agents for the Government in investigating prospective customers. We disagree. In *United States v. Banco Cafetero Panama*, 797 F.2d 1154 (2d Cir. 1986), the Second Circuit rejected a similar argument in holding that banks might be subject to forfeiture of bank account assets derived from drug proceeds.[13] The Court stated:

> Appellants contend that a broad application of the forfeiture statute to bank accounts will wreak havoc in the banking industry. They argue that banks will accept deposits at their peril, since investigation of the sources would be costly, time-consuming, and often unilluminating. The risk is vastly overstated. A bank has no duty to investigate the source of customers' deposits. It acts at its peril only when, as a passive receiver of knowledge, it learns that a deposit is derived from drug profits and nevertheless accepts that deposit. The statute imposes no investigatory costs on the banking system.

Banco Cafetero Panama, 797 F.2d at 1162.

Puentes was a reliable source of business. De la Mata wanted to make a profit. The honeymoon gift only sweetened the deal. However, drug proceeds are not a permissible source of business for the financial community. As the Eleventh Circuit has observed, "Those who knowingly do business with drug dealers do so at their own risk. [Claimant's] interpretation of 21 U.S.C. § 881(a)(6) would completely insulate money-launderers, and

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[13] Again, neither party has cited this decision.

others who knowingly do business with drug dealers, from possible forfeiture of their ill-gotten gains." *United States v. Four Million, Two Hundred, Fifty-Five Thousand,* 762 F.2d 895, 905 (11th Cir. 1985).

We recognize that a financial cost may attach to imposition of such a standard, in the sense of missed financial opportunity. However, Congress has determined that the financial community must bear some of the costs, because narcotics inflict a much greater cost on society. We agree with the Second Circuit that Congress did not intend to exempt banks from this mandate.

> Nothing in the terms or legislative history of the forfeiture statute gives the slightest reason to believe that Congress wished to accord banks any special insulation from vulnerability to forfeiture of assets traceable to drug proceeds. On the contrary, Congressional concern with money laundering points in precisely the opposite direction.

United States v. Banco Cafetero Panama, 797 F.2d 1154, 1162 (2d Cir. 1986); *cf. ARCA Airlines, Ltda. v. United States Customs Service,* 726 F.Supp. 827 (S.D.Fla. 1989) (Scott, J.) (For common carriers, "[s]ecurity measures [to detect narcotics] are part of the cost of doing business. We do not find the cost excessive in view of the risk.").

The Court concludes that Republic has failed to meet its burden of showing lack of actual knowledge.[14] On the contrary, every fact in the record points irrefutably to Republic's knowing involvement. These facts, when considered in their totality, suggest actual knowledge, if not complicity, on the part of the lender.[15] Congress has sent a clear message in the recent legisla-

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[14] Thus, like the court in *Four Million, Two Hundred and Fifty-Five Thousand Dollars,* 762 F.2d at 906 n. 24, we need not decide whether the claimant must prove that it did all that reasonably could be expected under the *Calero-Toledo* standard.

[15] In view of these factual findings, it is not necessary for the Court to rule on the credibility of the Government's final witness, Rene J. Leonard. However, if the Court were forced to decide this issue, we would be inclined to reject Leonard's testimony.

tion enacted that it will not permit the financial community to knowingly do business with drug dealers. This opinion merely follows that clear message. We do so with little reluctance.

V. CONCLUSION

Based upon the foregoing, it is hereby ORDERED as follows:

1. The Defendant property is subject to forfeiture.

2. Republic's claim is DENIED.

3. The United States is entitled to final judgment.

4. The United States shall submit a final judgment forthwith in accordance with this opinion.

5. The Court retains jurisdiction to effectuate the terms of this order and to assess costs upon appropriate motion.

DONE and ORDERED.

ADI:tc
final judg/forfeiture

FILED by (initialled) D.C.
MAR 15, 1990
ROBERT M. MARCH
CLERK U.S. DIST. CT.
S.D. OF FLA.-MIAMI

CLOSED
CIVIL
CASE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 88-0349-CIV-SCOTT

UNITED STATES OF AMERICA
Plaintiff.

v.

ONE SINGLE FAMILY RESIDENCE LOCATED AT 6960 MIRAFLORES AVENUE, CORAL GABLES, FLORIDA, ALSO KNOWN AS LOT 10, IN BLOCK 14, OF COCOPLUM SECTION 2 PLAT "B", ACCORDING TO THE PLAT THEREOF, AS RECORDED IN PLAT BOOK 115, AT PAGE 84 OF THE PUBLIC RECORDS OF DATE [SIC] COUNTY, FLORIDA, TOGETHER WITH ALL BUILDINGS, FIXTURES AND APPURTENANCES THERETO AND ALL IMPROVEMENTS THEREON,

Defendant.

FINAL JUDGMENT OF FORFEITURE

THIS CAUSE came on before this Court upon trial. This Court has issued its memorandum opinion herein. Accordingly, this Court finds as follows:

1. On February 26, 1988, plaintiff filed a Complaint for Forfeiture *In Rem* against the defendant property alleging that the property is forfeit to the United States of America pursuant to 21 U.S.C. §881(a)(6).

2. The defendant property, which includes all improvements, fixtures, and appurtenances thereto or thereon, is more particularly described as:

> Lot 10, in Block 14, of Cocoplum Section 2 Plat "B", according to the Plat thereof, as recorded in Plat Book 115, at Page 84 of the Public Records of Dade County, Florida.

3. On February 26, 1988, in accordance with the above Complaint, a Warrant of Arrest in Rem of the defendant property was issued and duly executed on March 7, 1988.

4. On March 28, 1988, Public Notice of Action and Arrest of the defendant property appeared by publication in the Miami Review and Proof of Publication of Public Notice of Action and Arrest was filed with the Court on April 5, 1988.

5. In addition to Public Notice of Action and Arrest having been completed, plaintiff personally served the following:

> a. Thule Holding Corporation, by and through its registered agent, as record owner of the defendant property on March 2, 1988.
>
> b. Republic National Bank of Miami, a potentially interested party, on March 2, 1988.
>
> c. Indalecio and Margarita Iglesias, potentially interested parties, on March 1, 1988.

d. Additionally, the Florida Department of Environmental Regulation was served via certified mail, return receipt requested. Notice was accepted on March 2, 1988.

6. Republic National Bank and Thule Holding Corporation have filed claims alleging interests in the defendant property.

7. No other parties have filed claims or answers in this matter.

8. A Memorandum Opinion has been entered by this Court denying all interests claimed by Republic National Bank. Thule Holding Corporation consented to forfeiture of its interests on June 9, 1988. On May 31, 1988, this Court entered an order for interlocutory sale. The defendant real property has already been sold pursuant to that order and this final judgment addresses the remaining proceeds of that sale.

9. The time for which other persons may file a claim and answer has expired.

Based on the above findings, and the Court being otherwise fully advised in the premises, it is hereby;

ORDERED AND ADJUDGED:

1. The court finds that plaintiff United States of America has probable cause to forfeit the defendant real property. This Court finds further that plaintiff United States of America had reasonable cause for this seizure pursuant to 28 U.S.C. §2465.

2. Republic National Bank's claim is denied with prejudice.

3. The proceeds of the interlocutory sale of the defendant real property is forfeited to the United States of America pursuant to 21 U.S.C. §881(a)(6), and no right, title, or interest to those proceeds shall exist in any other party.

4. Since the defendant real property has already been sold pursuant to this Court's prior orders, the United States of America is hereby directed to dispose of the remaining proceeds of the interlocutory sale, in accordance with law.

DONE AND ORDERED in Chambers at Miami, Florida, this 15 day of March, 1990.

/s/
UNITED STATES DISTRICT JUDGE
THOMAS E. SCOTT

cc: U.S. Marshal (2 certified)
Alan Dagen — AUSA
Stanley Beiley, Esq.

UNITED STATES OF America,
Plaintiff-Appellee,

v.

ONE SINGLE FAMILY RESIDENCE
LOCATED AT 6960 MIRAFLORES
AVENUE, etc., Defendant,

Republic National Bank of Miami,
Claimant-Appellant,

Thule Holding Corp., Claimant

No. 90-5295.

United States Court of Appeals,
Eleventh Circuit.
June 10, 1991.

Appeal from the United States District Court for the Southern District of Florida.

Before KRAVITCH and BIRCH, Circuit Judges, and DYER, Senior Circuit Judge.

DYER, Senior Circuit Judge:

This is an appeal of a civil forfeiture case brought by the United States against a parcel of real property situated in the Southern District of Florida. During the pendency of the action below, the real property was sold pursuant to an order of interlocutory sale. The proceeds of the sale were placed in the United States Marshal's account. A final judgment of forfeiture was entered on March 15, 1990. The claimant, Republic National Bank, holder of a mortgage lien on the property, timely filed its notice of appeal, but did not file a motion to stay execution or post a supersedeas bond. On April 20, 1990, the United States Marshal executed the judgment and transferred the proceeds of the interlocutory sale to the Asset Forfeiture Account of the United States Treasury. The United States filed its motion to dismiss the appeal on the ground that this transfer divested this court from

exercising *in rem* jurisdiction over the case. We grant the motion and dismiss the appeal for want of jurisdiction.

Facts

The United States initiated this *in rem* action seeking civil forfeiture of a single family residence located in the Southern District of Florida. The complaint alleged that Indalecio Iglesias owned the property, that he had engaged in narcotics transactions, and had used the proceeds of the transactions to purchase the property. The complaint sought forfeiture under 21 U.S.C. §881(a)(6). Service perfecting *in rem* jurisdiction was made by arresting the defendant property and by giving publication of notice in conformity with Supplemental Rules for Certain Admiralty and Maritime Claims, Rule C(4). Additionally, the government sent a notice of the suit to the potential claimant Republic National Bank, who was a mortgagee of the defendant property. Republic filed a claim and answer asserting an "innocent owner" defense.

On May 25, 1988, the government filed an agreed motion seeking a court order authorizing an interlocutory sale of the residence. The motion provided that the proceeds of the sale would be held by the United States Marshal and that the claims to the residence would then attach to the proceeds held by the Marshal, and be subject to the future determination of the court, without prejudice to the rights of any claimant. On May 31, 1988, an order for interlocutory sale was entered by the district court. It provided that all interests of any lienor and claimants would automatically transfer to the proceeds of the sale. The order also instructed the United States Marshal for the Southern District of Florida to retain custody of the proceeds of the sale pending the court's further order. This property was thereafter sold for approximately one million dollars.

During the pendency of the action, the grand jury indicted Indalecio Iglesias in the Southern District of Florida. He was alleged to be the real owner of the property, although Thule

Holding Corporation was the record owner. Iglesias was charged with criminal violations pertaining to the subject residence.

On March 15, 1990, the district court entered a final judgment of forfeiture and directed the United States to dispose of the remaining proceeds of the interlocutory sale, in accordance with law.

Republic timely filed its notice of appeal, but did not file a motion to stay execution of the final judgment or post a supersedeas bond. On April 20, 1990, the United States Marshal executed the judgment and transferred the proceeds of the interlocutory sale to the Asset Forfeiture Account of the United States Treasury.

Contentions of the Parties

On the merits of this appeal, Republic, as mortgagee, seeks to reverse the judgment of forfeiture against it for two reasons. First, it argues that the district court erred in applying a "constructive knowledge", instead of an "actual knowledge", standard to forfeit Republic's mortgage; and second, the court utilized clearly erroneous findings of fact on which to base its legal conclusions. Since the government's motion to dismiss the appeal is dispositive, we do not reach the merits.

The United States contends that when the United States Marshal for the Southern District of Florida executed the final judgment of forfeiture by transferring the substituted *res* from his custody to the Asset Forfeiture Account, no *res* remained in that district; ergo, the transfer divested the district court and this court from exercising *in rem* jurisdiction in this case.

Republic contends that there is continuing jurisdiction in this court because (1) by enacting 21 U.S.C. § 881(j) Congress modified the requirement that the *res* be within the court's territorial jurisdiction for § 881 forfeiture actions; (2) the district court had *in personam* jurisdiction; (3) there was consent to or estoppel to deny jurisdiction.

Jurisdiction Under 21 U.S.C. § 881(j)

Republic argues that Congress has modified the requirement that the *res* be within the court's territorial jurisdiction for Section 881 forfeiture actions and gives this court continuing jurisdiction to hear this appeal. Section 881(j) provides:

> In addition to the venue provided for in Section 1395 of Title 28 or any other provision of law, in the case of property of a defendant charged with a violation that is the basis for forfeiture of the property under this Section, a proceeding for forfeiture under this Section may be brought in the judicial district in which the defendant owning such property is found or in the judicial district in which the criminal prosecution is brought.

Republic reads the statute to mean that once Iglesias was indicted and found in the Southern District of Florida, the effect, under Section 881(j) is to add two bases, in addition to the fact that the property was located in this district, on which the court continues to have jurisdiction even after the property is removed from the district.

We find no support for this novel proposition. By its clear terms Section 881(j) simply affords the government a choice of venue as to where to bring a forfeiture action. It may choose to prosecute the forfeiture action either in the district where the *res* is located, in the district of the criminal prosecution, or the district in which the owner is found. This choice does not extend to claimants. Here the *res*, which was alleged to be owned by Iglesias, was forfeited in the Southern District of Florida. Republic filed its claim in the same district. The fact that Iglesias was indicted in the same district after the institution of the forfeiture proceedings is of no moment. Nor does the fact that Iglesias was found in the Southern District of Florida give continuing jurisdiction after the *res* has been removed. He never filed a claim and was never a party to the lawsuit. Finding Iglesias in the district was not necessary to effect the *in rem* forfeiture. Supplemental Rules for Certain Admiralty and Maritime Claims, Rule C(4)

only requires publication and seizure of the defendant property to notify potential claimants. The only basis for jurisdiction in this case is that the defendant property was located and arrested in this district. Accordingly, we find the provisions of Section 881(j) to be irrelevant to this Action.

United States v. One Lear Jet Aircraft, 836 F.2d 1571 (11th Cir.) (en banc), *cert. denied,* 487 U.S. 1204, 108 S.Ct. 2844, 101 L.Ed.2d 881 (1988) controls the result in this case. There the government initiated a forfeiture proceeding against a Lear Jet aircraft located in the Southern District of Florida pursuant to 8 U.S.C. § 1324(b). The aircraft had been used to enter the United States by persons who made material misrepresentations on their visa applications. Leybda Corporation filed a claim to the aircraft, but, after trial, the district court entered a judgment of forfeiture for the United States. Leybda filed a timely notice of appeal, but did not file a motion for stay or judgment or a supersedeas bond. The government executed the judgment by removing the aircraft to Missouri. On *en banc* reconsideration of this *in rem* jurisdictional issue, the court held that:

> We now hold that, because removal of the *res* from a court's territorial jurisdiction destroys that court's *in rem* jurisdictional, *Pennington v. Fourth National Bank,* 243 U.S. 269, 37 S.Ct. 282, 61 L.Ed. 713 (1917), this Court does not have jurisdiction to hear Leybda's appeal. The general rule of *in rem* jurisdiction is that the court's power derives entirely from its control over the defendant *res. Id.* at 272, 37 S.Ct. at 283; *L.B. Harvey Marine, Inc. v. M/V River Arc,* 712 F.2d 458, 459 (11th Cir. 1983). Where an appellant fails to file a stay of judgment or a supersedeas bond, and the *res* is removed from the court's territorial jurisdiction, the appellate court does not have *in rem* jurisdiction. *Taylor v. Tracot Marine, Inc.,* 683 F.2d 1361, 1362 (11th Cir. 1982), *cert. denied,* 460 U.S. 1012, 103 S.Ct. 1252, 75 L.Ed.2d 481 (1983); *Parks v. B.F. Leaman & Sons, Inc.,* 279 F.2d 529, 532 (5th Cir. 1960). This Circuit has recently reaffirmed this

traditional rule. *See Harvey Marine,* 712 F.2d at 459; *Taylor,* 683 F.2d at 1362.

Id. at 1573. We reiterated this rule in *United States v. One 1983 Homemade Vessel Named Barracuda,* 858 F.2d 643, 647 (11th Cir. 1988).

In *United States v. $57,480.05 U.S. Currency and Other Coins,* 722 F.2d 1457 (9th Cir. 1984), after a judgment of forfeiture was entered, the United States Marshal executed the judgment by delivering the funds held by him to the United States Attorney, who caused them ultimately to be paid into the United States Treasury. The claimant never sought a stay of execution of the judgment. The court dismissed the appeal holding that:

> In conducting this forfeiture proceeding, the district court was exercising *in rem* jurisdiction and the currency was the *res*. The power of the court derived entirely from its control over the defendant *res*. (citations omitted). Release or removal of the *res* from the control of the court ended the jurisdiction of the court, in accordance with the general rule.
>
> * * * * *
>
> The destruction of the district court's jurisdiction puts an end to ours as well. Were we to reverse the judgment of the district court, there would be no *res* upon which our mandate could operate. (citation omitted).

Id. at 1458-59.

Republic's attempt to avoid the impact of *One Lear Jet* by the misapplication of 21 U.S.C. § 881(j) is unavailing.

In Personam Jurisdiction

Republic asserts that even though this case was commenced as an *in rem* forfeiture action, once the government personally served Republic with process, and Republic filed a general ap-

pearance, this case became, as between Republic and the government, one involving both *in rem* and *in personam* jurisdiction. Therefore, even if the court lost *in rem* jurisdiction over the *res*, there would be continuing jurisdiction to hear this appeal.

The short answer to this argument is that this forfeiture action was initiated under Rule C of the Supplemental Rules. The defendant is the property. Under this Rule, the only requirement for *in rem* jurisdiction is that upon the filing of the complaint, there must be a publication of notice that the property has been arrested. The claimants are invited to file claims. Republic was not a named defendant and was not summoned into court under Fed.R.Civ.P. 4. Although not required to do so, the government served potential claimants with copies of the complaint and warrant of arrest of the defendant property, which notified them that the *res* was subject to forfeiture. Like *One Lear Jet*, the government never invoked *in personam* jurisdiction when it brought suit. It served the property, not the purported mortgagee who later filed a claim. Its jurisdiction was based solely on the *res;* the government did not consent to the court's *in personam* jurisdiction. It merely brought a forfeiture action against the defendant property. As the court there held:

> [W]e reject the notion that the United States consented to *in personam* jurisdiction by invoking the district court's *in rem* jurisdiction initially. To hold that the government "consented" to *in personam* jurisdiction would be tantamount to deciding that a court has *in personam* jurisdiction over any participant in an *in rem* proceeding. This does not comport with the traditional analysis of *in rem* jurisdiction. (Footnotes omitted).

Id. at 1576-77. The United States cannot be construed as consenting to *in personam* jurisdiction merely by notifying potential claimants that an *in rem* action has commenced.

Consent to or Estoppel to Deny Jurisdiction

In May 1988, at the government's request, Republic agreed to an interlocutory sale of the property. The agreed motion states in pertinent part:

> All present or possible liens or other claims to the defendant property will attach to the proceeds held by the Marshal, and will be subject to future determination by the court without prejudice to the right of any claimant.

The district court's order, entered upon the motion states, in pertinent part, that "all interests of any lienors and claimants shall automatically transfer to the proceeds of the sale. These interests shall be afforded the same priority on the proceeds as these interests had on the real property...." Further, the proceeds were payable "to the United States Marshal for the Southern District of Florida, who shall retain same in his custody pending this court's further order." Republic argues that the "without prejudice" agreement for the interlocutory sale of the property constituted the government's consent to the continued jurisdiction of this court, regardless of what happened to the substituted *res*. Moreover, Republic submits that the government's conduct in obtaining Republic's consent to a physical change in the *res* by announcing it would be "without prejudice", and then utilizing the physical change to prejudice Republic by defeating jurisdiction prompts the application of the principle that where removal of the *res* from the court's territorial jurisdiction is accidental, fraudulent or improper, removal of the *res* does not defeat *in rem* jurisdiction.

We do not agree with Republic's conclusions drawn from its reading of the agreed motion and the order entered thereon. Republic's lien on the defendant property attached to the proceeds of the sale, subject to the future order of the court. It litigated its claim and pursued all of its remedies against the proceeds just as they could have been asserted against the defendant real property. The final judgment of forfeiture ordered the United States to dispose of the proceeds according to law.

Republic had the option to move for a stay of execution or post a supersedeas bond to stay the release of the substituted *res*. It did neither. By complying with the district court's order, the government's conduct in executing upon the judgment was neither fraudulent nor improper. *One Lear Jet*, 836 at 1574 n. 2. *See United States v. $79,000 in U.S. Currency*, 801 F.2d 738 (5th Cir. 1986).

Conclusion

This appeal is DISMISSED for want of jurisdiction.

FILED
U.S. COURT OF
APPEALS
ELEVENTH CIRCUIT
AUG 7 1991
MIGUEL J. CORTEZ
CLERK

THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 90-5295

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ONE SINGLE FAMILY RESIDENCE LOCATED AT 6960 Miraflores Avenue, etc.,

Defendant

REPUBLIC NATIONAL BANK OF MIAMI,

Claimant-Appellant,

THULE HOLDING CORP.,

Claimant.

On Appeal from the United States District Court for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF HEARING EN BANC (Opinion *June 10, 1991,* 11th Cir., 19__, _____ F.2d _____).

Before: KRAVITCH and BIRCH, Circuit Judges, and DYER, Senior Circuit Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/
UNITED STATES CIRCUIT JUDGE

ORD-42
(9/90)

FILED
U.S. COURT OF
APPEALS
ELEVENTH CIRCUIT
AUG 26 1991
MIGUEL J. CORTEZ
CLERK

THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

For The Eleventh Circuit

No. 90-5295

D.C. Docket No. 88-349-CIV-TES

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ONE SINGLE FAMILY RESIDENCE LOCATED AT 6960 Miraflores Avenue, etc.,

Defendant

REPUBLIC NATIONAL BANK OF MIAMI,

Claimant-Appellant,

THULE HOLDING CORP.,

Claimant.

Appeal from the United States District Court
for the Southern District of Florida

Before: KRAVITCH and BIRCH, Circuit Judges, and DYER, Senior Circuit Judge.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the appeal in the above styled and numbered cause be and the same is hereby DISMISSED;

IT IS FURTHER ORDERED that claimant-appellant pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

Entered: June 10, 1991
For the Court: Miguel J. Cortez,
Clerk

By: /s/ _____
Deputy Clerk

ISSUED AS MANDATE: AUG 26, 1991